

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA**

IN THE MATTER OF:

M & S GRADING, INC.,

Debtor.

CASE NO. BK02-81632
CHAPTER 7

**TRUSTEE'S LIMITED OBJECTION
TO MOTION AND AMENDED
REQUEST FOR PAYMENT OF
ADMINISTRATIVE EXPENSE**

COMES NOW Trustee, James Killips, by and through his counsel, and hereby objects to the Contractors, Laborers, Teamsters and Engineers Health, Welfare and Pension Plans' (the "Plans") Motion and Amended Request for Payment of Administrative Expense (the "Motion") [Filing No. 863]. In support of his limited objection to the Motion, the Trustee states as follows:

1. The Trustee does not object to the Motion to the extent the Plans request allowance of their delinquent contributions in the amount of \$116,341.63 as a Chapter 11 administrative expense, incurred while Debtor was in a Chapter 11 bankruptcy. However, the Amended Motion appears to attempt to seek classification of that claim, or some portion of it, as a Chapter 7 ("super priority") administrative expense. This is not permitted by the Bankruptcy Code. Chapter 7 administrative expenses are those which are incurred during the Chapter 7 case, and which provide a benefit to the estate. Here, the actual benefits were incurred during the Chapter 11 case.

2. In addition, the Trustee objects to the Plans' request that interest, liquidated damages and attorneys' fees be classified as administrative expenses. The Trustee further objects to the request that the Court order him pay any such amount,

because there are insufficient assets in the estate to pay Chapter 11 administrative expense creditors in full.

3. Section 503(b)(1) of the Bankruptcy Code provides that the actual and necessary costs and expenses of preserving the estate shall be allowed as administrative expenses. The Plans' attorneys' fees, interest, and liquidated damages did not provide a tangible benefit to the estate. See, *e.g.*, *In re Athens/Alpha Gas Corp.*, 332 B.R. 578 (B.A.P. 8th Cir. 2005).

4. Such costs and expenses were incurred by the Plans in an attempt to preserve their own interest in the estate, and therefore should not be allowed as administrative expenses. See *Ins. Co. of N. Am. v. Sullivan*, 333 B.R. 55 (D.Md. 2005).

5. In addition, the amounts requested are substantial, and the Plans have not provided a breakdown of the attorneys' fees, interest, or liquidated damages and when they were incurred.

6. Section 726 of the Bankruptcy Code provides that in those instances where a case is converted to Chapter 7, Chapter 7 administrative expenses have priority over Chapter 11 administrative expenses.

WHEREFORE, the Trustee respectfully requests the Court to deny the Plans' Motion insofar as it requests a Chapter 7 super priority administrative expense, insofar as it requests attorneys' fees, interest, and liquidated damages be classified as administrative expenses, and insofar as it requests payment of any amount, and for such other and further relief the Court deems just and proper.

Dated this 26th day of March, 2009.

JAMES KILLIPS, TRUSTEE

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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